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IN THE

Supreme Court of the United States

March Term, 1947.

No. **1947**

49

WILLIAM SHAPIRO,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit.

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No.

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UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the Supreme Court
of the United States of America and the Honorable
Associate Justices Thereof:

Your petitioner, WILLIAM SHAPIRO, respectfully submits
this petition for a writ of certiorari directed to the Circuit
Court of Appeals for the Second Circuit, to review
the decision and judgment of the United States Circuit
Court of Appeals for the Second Circuit in the above cause,
affirming a judgment of conviction of the petitioner in the
District Court of the United States for the Southern Dis-
trict of New York, wherein the petitioner was convicted
of violating Maximum Price Regulations established under
the Emergency Price Control Act of 1942, 50 U. S. C. A.
App. 901, *et seq.*

The judgment of the Circuit Court of Appeals affirming the conviction of the petitioner was entered on February 7th, 1947 (R. 505-507).

Opinions Below.

The District Court rendered no opinion. A written opinion, not yet officially reported, was rendered by the United States Circuit Court of Appeals (R. 481-503).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347a), and as modified, pursuant to the Act of March 8, 1934 (18 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

Questions Presented.

The petitioner, a wholesaler of fruit and produce, was convicted of violating Price Control Regulations by requiring a customer to purchase other produce along with lettuce. It was contended by the petitioner and not denied by the prosecution, that the leads which led to the obtaining of information that brought about the criminal prosecution were developed from books produced by the petitioner in obedience to the subpoena issued by the Price Control Administrator. The petitioner contends that since he, a personal defendant, affirmatively claimed his constitutional and statutory immunity, when over his protest he was forced to produce the books called for by the Administrator's subpoena he was immune from prosecution, both under the provisions of the Immunity Section of the Emergency Price Control Act of January 30, 1942, and particularly U. S. C. Title 50, App. Sec. 922, as well as

the Constitution of the United States. The principal and sole questions therefore are:

1. Does Sec. 202 (g) of the Emergency Price Control Act (50 U. S. C. A. App. 922[g]) confer statutory immunity on one who is forced by the service of the Administrator's subpoena to produce under protest books and records required to be kept by Sec. 202(b) of the Emergency Price Control Act?
2. May it be contended that sales invoices, sales books, ledgers, individual records, contracts and records relating to the sale of commodities, ordinarily kept by the average businessman in the usual course of business, are not private but public documents, and the forced production of these records is not covered by the Immunity Provision of the Emergency Price Control Act Sec. 202(g)?
3. Is the constitutional immunity provided by the Fourth and Fifth Amendments of the United States Constitution co-extensive with the immunity provision of the Compulsory Testimony Act of February 11, 1893 (U. S. C. 1934, Ed. Title 49, Sec. 46), which is incorporated by reference in Sub-section g of Sec. 202 of the Emergency Price Control Act of 1942?

Statement.

Prior to the trial, the petitioner moved on March 13th, 1945, by a Plea in Bar for the dismissal of the information on the ground that he had obtained immunity (R. 120-122).

The petitioner in support of that motion showed that on or about September 29th, 1944 (more than two months prior to the filing of the information) the petitioner was served with a subpoena *Duces Tecum* and *Ad Testificandum* issued by the Price Administrator, directing him

to appear before the Chief Enforcement Attorney for the Office of Price Administration on October 2nd, 1944, to testify concerning

"all purchases and sales of fresh fruit and vegetables from Sept. 1, 1944 to Sept. 28, 1944;"

and to produce at that time

"all duplicate sales invoices, sales books, ledgers, individual records, contracts and records relating to the sale of all commodities from Sept. 1, 1944 to Sept. 28, 1944" (R. 127-128, also Exhibit "A", attached to Petition, R. 139-141).

The hearing in connection with the subpoena was adjourned to October 4th, 1944. On that day, petitioner appeared at the office of the Enforcement Attorney and after being sworn, was asked by the Enforcement Attorney to produce his books and records pursuant to the subpoena *Duces Tecum*. The attorney for the petitioner before any books were turned over, asked a question and received a reply from the Enforcement Attorney, as follows:

"Mr. Siskind: Is the witness being granted immunity as to any and all matters or information obtained as a result of the investigation and examination of these records?

Mr. Greif: The witness is entitled to whatever immunity which flows as a matter of law from the production of these books and records which are required to be kept pursuant to MPRs 271 and 426.

Mr. Siskind: Under those circumstances I believe that Mr. Shapiro would like to make a statement for the record" (R. 146-147).

The petitioner made this statement in the record:

"A. (By Mr. Shapiro) I wish to note that I am appearing here as an unwilling witness pursuant to subpoena served upon me and that I claim my constitutional privilege. I do not waive immunity and specifically claim immunity under the provisions of the Emergency Price Control Act of January 30, 1942, and particularly United States Code, title 50, section 922, as well as under the Compulsory Testimony Act of February 11, 1893 (United States Code 1934, title 49, section 46) and under the Constitution or any other applicable statute or provision or section of the United States Code or otherwise, as to any and all records produced or testimony given throughout this inquiry or investigation, or any proceeding arising thereunder. Upon these conditions I have produced the records and documents called for in your subpoena addressed to me and dated September 28, 1944" (R. 147-149).

The motion was denied on April 17th, 1945 for reasons stated by U. S. District Judge Coxe in a memorandum in three cases against Joseph Justman, *et al.*, decided at about the same time (decided April 17, 1945. Criminal Docket #C119-145) (R. 160-161).

The gist of the Court's decision was to the effect that no immunity attaches to books and records required to be kept by the provisions of Emergency Price Control Act. The Court completely disregarded the specific immunity provisions contained in that very Act.

At the trial, at the conclusion of the Government's case, the petitioner renewed the motion previously denied by Judge Coxe, urging the same grounds (R. 217-218). The Trial Judge refused to review Judge Coxe's decision, denied the motion and granted the petitioner an exception (R. 218).

The petition alleges, and it is not denied, that the allegations contained in Counts 7 to 11 of the information are based on facts obtained from the examination of the produced books and records (R. 134-135).

Petitioner was prosecuted for violation of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. Sec. 901). Section 202 (b) thereof provides:

"The administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defence-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

Sub-section (g) of said Section 202 provides:

"No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

The Compulsory Testimony Act of February 11, 1893 (49 U. S. C. A., Section 46) provides:

"Self-criminating testimony; perjury, refusal to testify. No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the preceding chapter on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year or by both such fine and imprisonment."

Pursuant to the authority granted him by Section 202 (b) set forth above, the Administrator issued the following regulations: (Maximum Price Regulation No. 426)

"Sec. 1439.3. Article 2. Section 14. Records.

(a) Every person subject to this regulation shall, so long as the Emergency Price Control Act of 1942, as amended, remains in effect, preserve for examination by the Office of Price Administration all his records, including invoices, sales tickets, cash receipts or other written evidences of sale or delivery which relate to the prices charged pursuant to the provisions of this regulation.

(b) Every person subject to this regulation shall keep and make available for examination by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, records of the same kind as he has customarily kept, relating to the prices which he charges for fresh fruits and vegetables after the effective date of this regulation, and in addition as precisely as possible, the basis upon which he determined maximum prices for these commodities."

Petitioner's contention is that since he was compelled to produce documentary evidence which furnished information and leads concerning the transactions which are the basis of the criminal information, he received immunity from prosecution.

As stated in the previous paragraphs, petitioner made due and timely application to the United States District Court for a dismissal of the information on the uncontradicted grounds that the information which was the basis for the criminal prosecution was obtained by the prosecuting authorities from books produced by him in obedience to a subpoena issued by the Price Control Administrator. The United States District Court both before as well as during the trial overruled this contention, holding that no immunity attaches to books and records re-

quired to be kept by the provisions of the Emergency Price Control Act. The Circuit Court of Appeals sustained that contention, holding in fact that the books involved were public documents and that the forced production of such books does not confer either statutory or constitutional immunity. By a unanimous decision of the Circuit Court of Appeals written by Clark, C.J., the judgment of conviction was affirmed on February 7th, 1947.

Specifications of Errors.

The Court below erred:

- (1) In holding, that the principle that the constitutional privilege against self-incrimination which protects individuals against being forced to produce private documents for inspection does not apply in the instant case, on the theory that the books produced were public records required by law to be kept.
- (2) In holding that the unambiguous, unequivocal and comprehensive statutory immunity provided by the Compulsory Testimony Act of 1893, incorporated by reference in the Emergency Price Control Act, should be construed as containing a qualification with regard to books and records kept by the average business man merely because they are books and records which the Administrator requires to be kept under the regulations issued by him pursuant to the statutory authority.

Reasons Relied on For Allowance of the Writ.

The Circuit Court of Appeals erroneously misconceived the purpose of the immunity statute. It, in fact, inserted into the act a qualification and practically amended an Act of Congress by judicial construction. The Court below seems to base its decision by relying on *Wilson v. United States*, 221 U. S. 361.

In that case, an officer of a corporation was subpoenaed to produce the corporate books and records. He refused to produce the same claiming his constitutional privilege under the Fifth Amendment. Although holding that an officer of a corporation has no privilege to refuse production of the books, papers and records of the corporation, even though their contents tend to incriminate him, the Court recognized that the privilege against self-incrimination protects an officer of a corporation against the compulsory production of his private books and papers (p. 377). However, the Court held that there the records were not personal records but those of the corporation, and that the Fifth Amendment of the Constitution was not applicable to corporations. In the course of its opinion, the Court stated that since corporations were creatures of the State they were required to produce their records if the Government so insisted and that they could not claim the benefits of the Fifth Amendment. The Court also said, by way of dictum, that a person who was required to keep records by governmental order could not claim the privilege of the Fifth Amendment since they were not private papers, but in their nature, public records. This dictum has never been followed in a case similar to ours where a statute requiring the keeping of records also contains an immunity provision.

We urge further that the petitioner received constitutional immunity under the provisions of the Fourth and Fifth Amendments of the United States Constitution.

The Fourth Amendment of the United States Constitution prohibits the compulsory production of a person's private books and records; whether it be by a search warrant or subpoena *duces tecum*, or by a notice to produce.

Article IV of the Articles provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against un-

reasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article V of the same provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The pertinent clause of the last Article is "nor shall be compelled in any criminal case to be a witness against himself."

A brief review of the history of the statutes governing the provisions for immunity to a natural person as co-extensive with the immunity guaranteed under the Fourth and Fifth Amendments of the United States Constitution is enlightening. Government agencies found themselves obstructed in the prosecution of suits against individuals and corporations because of witnesses claiming their constitutional privilege under the Fifth Amendment. Therefore, in order to aid the Government in obtaining necessary evidence, Congress adopted the Immunity Statute of February 25, 1868 (R. S. #860) which, in brief, provided that no evidence obtained from a witness could be used against him in a criminal proceeding.

In *Counselman v. Hitchcock*, 142 U. S. 547, the Supreme Court declared this Immunity Statute unconstitutional because the immunity granted thereby was not co-extensive with the Fifth Amendment. The Court pointed out on page 564 that the Statute would not

"prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such Court. It could not prevent the obtaining and the use of witnesses and evidence which should be applicable directly to the testimony which he might give under compulsion, and on which he might be convicted, when otherwise, and if he refused to answer, he could not possibly have been convicted."

A new statute was then passed by Congress, the Act of February 11, 1893, and incorporated in the Emergency Price Control Act of 1942 (Section 202, Subdivision g), under which the petitioner herein claimed immunity.

This act was declared constitutional in *Brown v. Walker*, 161 U. S. 591, holding that the Fifth Amendment does not deprive Congress of the power to compel the giving of testimony or the production of books and records, even though said testimony or books and records might incriminate the witness, provided that immunity be accorded the witness and that said immunity was complete and in all respects commensurate with the protection guaranteed by the constitutional limitation. The Court stated that this immunity statute was one of general amnesty and the desired protection of the Constitution was fully accomplished.

This holding was reiterated by the Supreme Court in numerous other cases including *Glickstein v. United States*, 222 U. S. 139, wherein the Court stated on page 141:

"It is undoubted that the constitutional guaranty of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even although the testimony, when given, might serve to incriminate the one testifying, provided immunity be accorded, the immunity to be complete; that is to say in all respects commensurate with the protection guaranteed by the constitutional limitation."

In support of this oft-repeated proposition, the Court cites:

Brown v. Walker, 161 U. S. 591; *Burrell v. Montana*, 194 U. S. 572; *Jack v. Kansas*, 199 U. S. 372; *Ballmann v. Fagin*, 200 U. S. 186; *Hale v. Henkel*, 201 U. S. 43; *Heike v. United States*, 217 U. S. 423.

In the case at bar it is conceded that the petitioner when appearing with the books and records and for the purpose of giving testimony pursuant to the directions of the subpoena served upon him, affirmatively claimed immunity.

The Office of Price Administration, by examining the books and records of the petitioner, was necessarily able to obtain leads which became the basis of the criminal information. This is obvious from an examination of the attached exhibits (R. 151-159). By obtaining the names of the particular customers with whom the petitioner traded during the period from September 1st, 1944 to September 28th, 1944, including the name and address of the witness D'Avino, the Government was able to go further and examine these particular customers as to transactions prior and subsequent to the period covered by the subpoena.

It is not essential that the Government should have received this information from these sources. It is sufficient that the Government *may* have. This has been the law since at least the time of Chief Justice John Marshall, who stated in the famous Aaron Burr trial (1 Burr's Trial, p. 244):

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

The report of the Senate Committee on Banking and Currency submitted to accompany the Emergency Price Control Act (H. R. #5990) and being Senate Report No. 931 of the year 1942, states as follows (p. 21):

"Section 202(a) authorize the administrator to make studies and investigations and to obtain the economic and other data necessary or proper in prescribing maximum price, rent, and other regulations and orders, and in the administration and enforcement of such regulations and orders and of the provisions of the bill. This authority may be enforced through the usual forms of compulsory process and the power to inspect and copy documents, inspect inventories and defense-area housing accommodations. The power to require by regulation or order keeping of records and the making of reports is also granted by *this subsection*."

"Although, no person is excused from complying with any requirement of *this subsection*, because of his privilege against self-incrimination, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, are made applicable with respect to any individual who specifically claims such privileges."

The words "subsection" in both paragraphs indicate that Congress intended that the immunity provision was to apply to records and reports required to be kept under that very Act.

It is significant that the immunity provisions of the Emergency Price Control Act required the individual to specifically claim such privilege. The Government would be in a position of determining whether, though immunity be granted, the evidence was necessary to undertake its investigation, or the Government could take the alternative of not accepting this evidence because of the claim, but relegate itself to procure evidence from other sources. The latter procedure was adopted by the Securities and Exchange Commission in the case of *Edwards v. U. S.*, 312 U. S. 473.

Immunity provisions similar to the one here involved are contained in other Federal statutes which also require the maintenance of books and records or authorize the enforcing agency to require their maintenance. These include:

Securities Exchange Act of 1934, 42 Stat. at L. 74, chap. 38, 15 U. S. C. A. 77; *National Labor Relations Act*, 15 Stat. at L. 449; 29 U. S. C. A. 161; *Public Utility Holding Company Act of 1935*, 49 Stat. at L. 803, chap. 687, 15 U. S. C. A. 79s; *Federal Power Act*, 49 Stat. at L. 858, chap. 687, 16 U. S. C. A. 825f; *Civil Aeronautics Act of 1938*, 52 Stat. at L. 973, chap. 601, 49 U. S. C. A. 644; *Fair Labor Standards Act of 1938*, 52 Stat. at L. 1060, chap. 676, 29 U. S. C. A. 208.

That the immunity provisions of a statute should not be construed to be meaningless is seen from cases arising under the Securities Exchange Act which, as stated above, has an immunity provision similar to that contained in the Emergency Price Control Act (15 U. S. C. A. 78v) and a section authorizing the Securities and Exchange Commission to regulate the maintenance of records. *Edwards v. United States*, cited *supra*.

The question of Federal Law which is involved here is an important one which should be settled by this Court. A research of the reported cases shows that the question of the applicability of the immunity provision of the Emergency Price Control Act to the forced production of books and records kept by a business man pursuant to the requirement of the Act, was raised only twice in criminal proceedings, once in the instant case, and again in another proceeding known as *In re Hoffman*, decided by the District Court of the United States for the District of Columbia on October 4th, 1946 (68 F. Supp. 53).

None of the cases cited by the Circuit Court in its written opinion (footnote of page 166 of the record), except *In Re Hoffman*, cited *supra*, involved the construction of the specific statutory immunity provision of the Emergency Price Control Act. They were mainly civil proceedings and dealt primarily with the statutory provision giving the Administrator the right to compel the production of books and records required by him to be kept and the contention of the defendants that the right given to the Administrator to subpoena such records violated the defendants' constitutional privileges against self-incrimination. While these Courts in these decisions by way of *dictum* refer to the fact that books and records required by the Emergency Price Control Act to be kept are in the nature of quasi-public documents, the construction of the statutory immunity was not involved. The construction of the statute of immunity was first raised in the instant case and again *In re Hoffman*, cited *supra*.

The decision of the District Court *In re Hoffman*, *supra*, is directly contrary to the decision in the instant case. *In re Hoffman*, the District Court held

"that the statute should be construed so as to accord immunity from prosecution on the basis of information obtained from any records produced in response to a subpoena issued by the Administrator, because the statute contains no exception and no limitation and there is no ambiguity or obscurity in the legislative enactment" (p. 54).

That decision is now on appeal to the United States Court of Appeals for the District of Columbia and is designated *United States of America v. James Hoffman*, #9435. The appeal has not yet been argued. So, in fact, we have now two contrary decisions on an important question of Federal Law which should be settled by this Court.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, be granted to review the decision and judgment of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel.

March 3, 1947.

